

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER GONZALEZ,

Defendant and Appellant.

D075363

(Super. Ct. No. INF1402485)

APPEAL from a judgment of the Superior Court of Riverside County, Randall D. White, Judge. Judgment of conviction affirmed, sentence vacated, and remanded for further proceedings.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Alana R. Butler and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Gonzalez, and his girlfriend, codefendant Tracey Manjarrez, were twice jointly tried for, among other things, unlawfully taking a vehicle. The court declared a mistrial after the first jury failed to reach a verdict. A second jury convicted Gonzalez of unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a), count 1) and found true the allegation that he committed the offense to promote a criminal street gang (Pen. Code,¹ § 186.22, subd. (b)(1)(A)). The jury also convicted him of fleeing a pursuing peace officer's motor vehicle while driving recklessly (Veh. Code, § 2800.2, count 2) and being an active participant of a criminal street gang (§ 186.22, subd. (a), count 4).²

In a bifurcated trial, the court found true the allegations that Gonzalez's prior convictions for robbery (§ 211) and discharging a firearm with gross negligence (§ 246.3) qualified as prior strike convictions and as prior serious felony convictions. (§§ 667, subds. (a), (c) & (e)(1) & 1170.12, subd. (c)(1).) The court also found true the allegation that Gonzalez had served a prior prison term. (§ 667.5, subd. (b).)

The court sentenced Gonzalez to an indeterminate term of 25 years to life on count 1. The court stayed the sentences for the gang enhancement on count 1 and being an active gang participant on count 4 under section 654. Gonzalez received the middle term of four years (two-year midterm, doubled) for his evading arrest conviction, and the court imposed five-year sentences on each of the two prior serious felony convictions and an

¹ Undesignated statutory references are to the Penal Code.

² The jury convicted Manjarrez of count 1, including the gang enhancement, and count 4.

additional year for his prior prison term, for a total determinate prison sentence of 15 years.

Gonzalez appeals, contending that his conviction for unlawfully taking a vehicle must be reversed because the trial court erred in excluding Manjarrez's statement to an investigator that she had stolen the car. He also contends insufficient evidence supported the court's finding that his prior conviction for discharging a firearm with gross negligence (§ 246.3) qualified as a serious felony and a strike. He requests that the abstract of judgment be corrected and the matter remanded to allow the trial court to exercise its discretion to strike the five-year prior serious felony enhancements.

We affirm the judgment of conviction, but reverse the true finding on Gonzalez's prior conviction for violating section 246.3 alleged as a strike for insufficient evidence. We agree that the matter must be remanded. Accordingly, we vacate the sentence and remand the matter to the superior court to (1) correct the abstract of judgment, (2) exercise its discretion regarding striking Gonzalez's five-year prior serious felony enhancements, and (3) allow the People to exercise their discretion to retry the prior conviction allegation.

GENERAL FACTUAL BACKGROUND

In the early morning hours on a day in September 2014, Elva R. saw two males and a female in the parking lot of her apartment complex. She became suspicious when she saw the door of her neighbor's car open and a person inside the car. She alerted her neighbor, Rafael N., that someone was inside his parked Honda Civic. By the time

Rafael got to the parking lot, his car was gone. Rafael alerted the sheriff's department and the license plate number of the Honda was entered into the stolen vehicle system.

At approximately 1:00 p.m. that same day, a sheriff's deputy was driving a marked patrol vehicle when she noticed a Honda Civic with a license plate positioned in the rear window. She ran the license plate number and learned that the Honda had been reported stolen. The deputy followed the Honda into a parking lot and initiated a stop. The deputy parked perpendicular to the Honda and activated her vehicle's emergency lights. The deputy got out of her vehicle and ordered the driver, Gonzalez, and his passengers, Manjarrez and Dominic B., to remain inside the car. The deputy went back to her patrol vehicle and opened the passenger door to serve as a shield for her backup. When she returned to the driver's side, Gonzalez started backing up the Honda.

Gonzalez then pulled out of the parking lot and drove away. The deputy gave chase, activating her vehicle's emergency red and blue lights and siren. The deputy, joined by a marked California Highway Patrol vehicle, pursued Gonzalez. During the pursuit, Gonzalez failed to stop at several stop signs and red traffic lights. He also exceeded the posted speed limit by 15 to 25 miles per hour in a non-school zone and by 50 miles per hour in a school zone. Gonzalez ultimately stopped the Honda. The three occupants fled on foot and were later apprehended.

DISCUSSION

I. NO ERROR IN EXCLUDING MANJARREZ'S HEARSAY STATEMENTS

A. Additional Background

After her arrest, Manjarrez waived her *Miranda*³ rights during a police interview. At the preliminary hearing, a sheriff's investigator testified about Manjarrez's statements during the interview. Manjarrez claimed that she had used a shaved key to steal the Honda earlier that day from an apartment complex after arguing with her mother about borrowing her mother's car. She told Gonzalez, her boyfriend, that she had borrowed the Honda from her sister. While driving the Honda, Gonzalez asked her why they were being stopped by the police. She told him that she had stolen the Honda. She claimed that Gonzalez fled after telling her that she was stupid and that he could not go back to jail.

In his trial brief, defense counsel described Manjarrez's statements to the sheriff's investigator. During pretrial discussions, the prosecutor advised the trial court and defense counsel that, unlike the prosecutor who tried the first trial, she did not intend to introduce Manjarrez's statements to the investigator during the People's case-in-chief. After defense counsel stated that he wanted to introduce the statement into evidence, the trial court had the parties brief the issue.

Gonzalez sought to admit Manjarrez's hearsay statements as a declaration against penal interest because Manjarrez admitted stealing the Honda. The prosecutor asserted

³ *Miranda v. Arizona* (1966) 384 U.S. 436, 444.

that Manjarrez's statements were unreliable and thus inadmissible. The prosecutor stated that Gonzalez and Manjarrez had a child together and Manjarrez had an incentive to fabricate her involvement to protect Gonzalez. The trial court excluded Manjarrez's statements to the sheriff's investigator as unreliable.

B. *Analysis*

Gonzalez contends the trial court prejudicially abused its discretion by excluding Manjarrez's statements to the investigator because they were admissible as a declaration against penal interest. (Evid. Code, § 1230.) He asserts that Manjarrez's statements were trustworthy because they were made shortly after her arrest, during a police interrogation and after waiver of her *Miranda* rights. Accordingly, he argues that his conviction for unlawfully taking a vehicle should be reversed because the error denied him a fair trial. He notes the lack of direct evidence showing that he stole the vehicle, and Manjarrez's statement that she stole the Honda, supported his defense of factual innocence and third party culpability. We find no error.

"Hearsay may be briefly understood as an out-of-court statement offered for the truth of its content." (*People v. Sanchez* (2016) 63 Cal.4th 665, 674.) "Hearsay is generally inadmissible unless it falls under an exception." (*Ibid.*) One such exception permits the admission of any statement that "when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement

unless he believed it to be true." (Evid. Code, § 1230.) "[T]he rationale underlying the exception is that 'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements." (*People v. Grimes* (2016) 1 Cal.5th 698, 711 (*Grimes*).)

"To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citation.] 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation] [¶] We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. [Citation.] Whether a trial court has correctly construed Evidence Code section 1230 is, however, a question of law that we review de novo." (*Grimes, supra*, 1 Cal.5th at pp. 711-712.)

Manjarrez's statement that she stole the Honda qualifies as a declaration against her penal interest. Gonzalez argues that Manjarrez was an unavailable witness because she was a codefendant. The People do not argue this factor and thus tacitly concede that Manjarrez qualified as an unavailable witness. Accordingly, the admissibility of

Manjarrez's statements turn on whether they were sufficiently reliable to warrant admission despite their hearsay character.

Manjarrez's statements inculcate her in the crime and exculpate Gonzalez. In deciding the admissibility of such statements, courts may "consider whether the portion of a confession that tends to exculpate another, rather than to shift blame or curry favor, should be admitted [under Evidence Code section 1230] in view of surrounding circumstances, even though the exculpatory portion of the statement is not independently disserving of the declarant's interests." (*Grimes, supra*, 1 Cal.5th at p. 715.) Courts must consider each statement in context to determine "[w]hether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.' " (*Id.* at p. 716.) Our high court recognized that "sometimes a declarant who makes an inculpatory statement may have a substantial incentive to exculpate others. A member of a criminal street gang, for example, may choose to take the fall for fellow gang members by making a confession that exculpates them. A trial court in that situation may reasonably conclude that the declarant's incentive to protect his friends renders the exculpatory portions of the statement inadmissible." (*Ibid.*)

In arguing the issue to the trial court, the prosecutor represented that Gonzalez and Manjarrez were in a romantic relationship and shared a child. Although Gonzalez's probation report states that Gonzalez is not married, it lists Manjarrez as his spouse and notes that the couple has a child together. Additionally, a gang expert opined that

Gonzalez and Manjarrez are fellow gang members of the Varrio Mecca Rifa criminal street gang. Stealing cars is one of the primary activities of this criminal street gang. The trial court could reasonably conclude that Manjarrez's statements were untrustworthy because she had an incentive to inculcate herself to protect Gonzalez, the father of her child and fellow gang member. Under the circumstances, we conclude that the trial court did not abuse its discretion in determining that Manjarrez's statements were not sufficiently reliable to qualify for admission as a declaration against penal interest.⁴

II. *INSUFFICIENT EVIDENCE SUPPORTED TRUE FINDING ON PRIOR CONVICTION*

A. *General Legal Principles*

To qualify as a "strike," a prior conviction must be a "violent felony" listed in section 667.5, subdivision (c), or a "serious felony" listed in section 1192.7, subdivision (c). (§§ 667, subd. (d) & 1170.12, subd. (b).) The crime of discharging a firearm in a grossly negligent manner under section 246.3 qualifies as a violent felony only if "defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55." (§ 667.5, subd. (c)(8).) Such a crime qualifies as a serious felony only if "defendant personally uses a firearm" (§ 1192.7, subd. (c)(8).)

⁴ For the first time in his reply brief, Gonzalez argues that the People's use of Manjarrez's statements in the first trial, that resulted in a mistrial, should preclude the state from making a contrary, inconsistent argument before this court, on the grounds of estoppel and a violation of federal due process. Arguments raised for the first time in a reply brief on appeal are forfeited. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218-1219.)

"The prosecution has the burden of proving beyond a reasonable doubt each element of a prior conviction used to enhance a defendant's sentence." (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128.) A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066.) "[I]f the prosecutor presents, by such records, prima facie evidence of a prior conviction that satisfies the elements of the recidivist enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred. [Citations.] [¶] However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. (*Ibid.*) In determining whether the trial court properly found that defendant's prior conviction qualifies as a serious felony and a strike, "we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*Id.* at p. 1067.)

B. *Analysis*

Gonzalez contends that the People introduced insufficient evidence to prove that he personally used a firearm when he was convicted of discharging a firearm in a grossly negligent manner. We agree.

For the court trial on the prior conviction allegations, the prosecutor submitted exhibit 57 concerning Gonzalez's prior strike conviction in case No. INF1100123. The exhibit contained the complaint, amended complaint, information, felony plea form, and abstract of judgment. The complaint charged Gonzalez in count 1 with willfully discharging a firearm in a grossly negligent manner on or about October 30, 2010. It was alleged that in committing that offense, Gonzalez personally used a firearm. (§§ 667 & 1192.7, subd. (c)(8).) In count 2, Gonzalez was charged with unlawfully possessing a firearm on or about October 30, 2010, having previously been convicted of a felony. The complaint also alleged a prior prison term under section 667.5, subdivision (a). Gonzalez also had a 2008 robbery conviction that was alleged as a prior strike and prior serious felony conviction. (§§ 667, subds. (c) & (e)(1) & 1170.12, subd. (c)(1).)

The amended complaint contained the same allegations. The information contained the same charges and included an additional count for making a criminal threat in violation of section 422 on or about October 30, 2010 (count 3). Gonzalez pleaded guilty to the following charges and enhancements:

"Ct 1 – 246.3 (Strike) Allegation

"Enhancement 667 (c) + (e)(1) – INF062171 June 10, 2008"

In exchange, the prosecutor dismissed the following charges and enhancements: "Ct 2, Ct 3, allegation 667(a)." The abstract of judgment shows a conviction on count 1 of "PC 246.3 Discharge Firear" [*sic*] for which Gonzalez was sentenced under his plea to the midterm of four years in prison, pursuant to "PC 667(b)-(i) or PC 1170.12 two-strikes." The trial court found true all the prior conviction allegations.

The parties agree that a violation of section 246.3 qualifies as a "strike" conviction only if Gonzalez personally used a firearm. Gonzalez correctly notes that it is possible to be convicted of violating section 246.3 "without personally using a firearm, e.g., as an aider and abettor." (*People v. Golde* (2008) 163 Cal.App.4th 101, 112.) The People dismiss this possibility because nothing in the record of conviction shows any codefendants. The People have the burden of showing the nonexistence of any codefendants (*People v. Rodriguez, supra*, 122 Cal.App.4th at p. 128), but they did not supply the reporter's transcript of Gonzalez's plea or the factual basis for it. The mere fact the charging documents did not charge a codefendant does not eliminate the possibility that Gonzalez's violation of section 246.3 could have been based upon his being an aider and abettor to the shooter.

The People next claim that the word "strike" speaks for itself. Gonzalez disagrees, asserting it is unclear whether the phrase "(Strike) Allegation" refers, as the People suggest, to an admission by him of the personal use of a firearm, or, alternatively, whether the phrase refers to an admission by him of the prior strike allegation in that case.

Gonzalez's argument focuses on the first line of his admission ("Ct 1 – 246.3 (Strike) Allegation") and ignores the second line of his admission ("Enhancement 667 (c) + (e)(1) – INF062171 June 10, 2008"). The second line clearly refers to his 2008 robbery conviction in case INF062171 which was alleged as a prior strike and prior serious felony conviction under sections 667, subdivisions (c) & (e)(1) and 1170.12, subdivision (c)(1). Accordingly, the first line of his admission ("Ct 1 – 246.3 (Strike) Allegation") could

only mean that his section 246.3 conviction constitutes a "strike" conviction because he admitted the truth of the personal use of a firearm allegation attached to count one. We agree with the People that the plain meaning of the written plea agreement suggests that Gonzalez pleaded guilty to count one and admitted the truth of the personal use of a firearm allegation, thus making count one a strike conviction.

This conclusion, however, does not resolve the matter because the abstract of judgment reflects the conviction on count 1, but does not reflect the enhancement for personal use of a firearm. As Gonzalez notes, this portion of the abstract is blank. Without citation to authority, the People argue that this omission "proves nothing because the gun use allegation did not independently add any time to his sentence, it only qualified the conviction as a strike; so there was no reason for it to be on the abstract of judgment." While we agree with the People that the omission in the abstract of judgment proves nothing, it creates an ambiguity that cannot be ignored.

A court may examine the entire record of the prior conviction in determining the underlying facts, but not look outside it. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355.) The reporter's transcript of the plea is a portion of the record of conviction. (*People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350.) Here, the ambiguity can be resolved by reviewing the reporter's transcript of the plea. On this record, we find that the People failed to meet their burden of proof. Accordingly, the true finding that Gonzalez's prior section 246.3 conviction qualified as a strike is reversed, and the enhancement imposed for that prior conviction is stricken.

The People contend that, under these circumstances, the prosecutor should be given the opportunity to obtain the reporter's transcript of Gonzalez's 2011 guilty plea to further clarify the underlying basis of his plea. We agree. Thus, we vacate the sentence and remand to allow a retrial on the prior strike allegation and resentencing. (*People v. Barragan* (2004) 32 Cal.4th 236, 239 [a retrial is permissible when an appellate court reverses a prior strike finding for insufficient evidence].)

III. *THE ABSTRACT OF JUDGMENT REQUIRES CORRECTION*

Gonzalez notes two errors in the abstract of judgment. The respondent's brief does not address either contention. He first notes that the abstract of judgment contains a check mark in the box at paragraph 8 indicating that he was sentenced pursuant to section 667.61. He correctly contends this checkmark is erroneous because section 667.61 pertains to felony sex offenses and he was sentenced under the Three Strikes law pursuant to section 667, subdivisions (b)-(i) and section 1170.12, subdivisions (a)-(d). Gonzalez also notes that the abstract of judgment omits the custody credits awarded by the trial court. Gonzales is correct that the abstract fails to contain the custody credits awarded by the trial court consisting of 2,153 days credit, which included 1,077 actual days and 1,076 local conduct days. We will direct the trial court to correct these clerical errors. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may order correction of clerical errors reflected in abstract of judgment].)

IV. *PRIOR SERIOUS FELONY ENHANCEMENTS*

The trial court imposed a consecutive five-year term on each of the two prior serious felony convictions that it found true. At the time of sentencing, the court was

required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018, the Governor signed Senate Bill (Sen. Bill) No. 1393, which, effective January 1, 2019, amended section 1385, subdivision (b), to allow a court to exercise its discretion whether to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

The People concede, and we agree, that Sen. Bill No. 1393 applies retroactively to Gonzalez's judgment, which was not yet final as of January 1, 2019. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745 [absent evidence of contrary legislative intent, the Legislature intends statutes reducing the penalty for a crime or providing the trial court discretion to do so to apply retroactively to all cases not final when the statutes take effect].) Because we cannot conclusively determine from the record that remand would be a futile act, we remand for the trial court to consider whether to dismiss or strike the five-year section 667, subdivision (a), enhancements imposed on Gonzalez. (See *Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3 [Remanding for resentencing when "[t]he record does not indicate that the court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant."].) We express no opinion about how the court should exercise its discretion.

DISPOSITION

The judgment of conviction is affirmed, the sentence is vacated, and the case is remanded to the superior court for further proceedings consistent with the views expressed in this opinion, including to correct the abstract of judgment and allow the trial court to exercise its discretion regarding striking Gonzalez's five-year prior serious felony enhancements. The People may retry the prior conviction allegation within the time allowed by statute. (Pen. Code, § 1382, subd. (a).) If the People elect to not retry the strike allegation, the superior court shall resentence Gonzalez without considering the finding we have reversed. A new abstract of judgment shall be prepared after resentencing and forwarded to the Department of Corrections and Rehabilitation.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.